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November 18, 2003

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2003 NOV 18 P 4:43

Lawrence H. Norton, General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Subject: MUR 5392

Response by Clark for President, Inc., to complaint letter, with enclosures, dated October 21, 2003, filed with FEC by three named individuals ("complainants") who list addresses in Iowa City, Iowa

Dear Mr. Norton:

This responds to the subject complaint that was sent via first class mail and received by counsel to Clark for President, on or after November 3, 2003.

In summary, complainants allege that General (USA ret.) Wesley Clark's speech on September 19, 2003, at the University of Iowa College of Law was delivered as part of a presidential campaign event held at the university. Accordingly, the complaint concludes that any speaking fees and related travel expenses paid to him for the speech by any incorporated entity or affiliated fund of the university were allegedly unlawful campaign contributions pursuant to the Federal Election Campaign Act of 1971, as amended ("the FECA") and FEC rules.

With all due respect, complainants are mistaken and wrong, both as to the facts and the law. Accordingly, the General Counsel and the Commission should promptly conclude that the complaint presents no reason to believe that any violation of the Act or Commission regulations has occurred, or in the alternative, that MUR 5392 should be closed without investigation or any further action by the Commission.

General Clark presented the Iowa speech pursuant to a contract between his agent, Greater Talent Network, Inc. ("GTN"), and the university that was negotiated in March of 2003, and signed on April 23, 2003. He did not become a candidate for President until September 17, 2003, and a campaign organization was not in place, including the designation and authorization of campaign officials in Iowa or Arkansas or any other State until September 30 at the earliest, more than 10 days after the date of the speech. Furthermore, in view of the perceptions by some that his appearance might nevertheless be considered as a presidential campaign event, General Clark declined to accept any payment from the university for his travel to and from the event. All travel expenses in connection with the September 19 speech at the university were paid by Clark for President, Inc., and reported as campaign expenditures.

In addition, acting on his instructions, General Clark's agent refunded the speaker's fee paid by the university in the net amount of \$24,000. (GTN retained its earned \$6,000 commission for the speech since that did not constitute compensation or payment by the university to General Clark.) See enclosed copy of letter dated October 24, 2003, and signed by Thomas I. Marcossan, Executive Vice President, Greater Talent Network, New York, NY. Also enclosed is a copy of GTN's check in the amount of \$24,000, which cleared in GTN's bank account on November 4, 2003.

Complainants' view of the "federal election law" applicable to this matter erroneously relies on dicta in a 1992 advisory opinion of the Commission, Advisory Opinion 1992-6. More importantly, complainants fail to even cite, much less discuss, Commission regulations promulgated in 1996 that explicitly permit Federal candidates to make public appearances at university facilities to speak about and discuss any subject matter, such as election campaign issues, under certain conditions. These include the duty of the university to make "reasonable efforts to ensure" that the candidate's speech and related events occur "in an academic setting" and "are not conducted as campaign rallies or events." 11 CFR 114.4(c)(7)(ii). 60 *Fed. Reg.* 64260, 64270, December 14, 1995.

Advisory Opinion 1992-6 was issued in response to a request by an agent of David Duke who had accepted an invitation to speak at Vanderbilt University in Nashville, Tennessee. (Contrary to complainants' description of the opinion, Vanderbilt did not request the opinion or otherwise join the Commission's consideration of the question presented.) The opinion explained that the Vanderbilt speech would occur more than two months after Mr. Duke had filed as a presidential candidate in the 1992 election cycle and less than 30 days before the 1992 presidential primary in Tennessee. Mr. Duke was listed as a presidential candidate on the ballot for that primary election. The university had apparently offered to pay a fee and travel expenses to Mr. Duke. In concluding that the FECA and Commission regulations would allow the university and Mr. Duke to proceed with his appearance, and also allow the university's payment to him of the speech fee and related expenses, the Commission did state its concern that Mr. Duke (and the university) avoid campaign advocacy and other activity that could turn the speech into a campaign event. The date of the proposed event and the looming

Tennessee primary election in which Mr. Duke was a candidate were significant facts noted in the Commission's opinion.

For several reasons, this 1992 opinion has little, if any, relevance to General Clark's speech and appearance on September 19, 2003, at the University of Iowa event.

a) It is significant that Advisory Opinion 1992-6 has not been cited by the Commission in any later opinion in a subsequent election cycle that involved a candidate's speaking appearance at a university event open to the public. Furthermore, in those opinions where AO 1992-6 was cited, it was simply to reiterate the Commission's view of conduct by a candidate or another person that might cause a candidate's public speech appearance, or related activity, to be treated as a campaign event. Advisory Opinions 1992-05 and 1994-15 (Members of Congress allowed to host or participate in televised issue forums viewed by their electorates during an election year when they were candidates for re-election); Advisory Opinion 1996-11 (Two Members of Congress, one seeking re-election and the other pursuing a presidential campaign, allowed to speak before public audience attending national convention of tax-exempt, issue advocacy corporation if their appearances avoid express advocacy of their campaigns and contribution solicitations, and if host organization does not pay travel expenses for any speaker candidate who conducts collateral campaign events while present in convention city); and Advisory Opinion 1999-11 (Incumbent State legislator running for Congress allowed to continue past practice of holding and publicly advertising weekly "over-coffee" meetings with her constituents to discuss State legislative issues without expenses treated as contribution to her Congressional campaign).

b) A factual situation similar to that posed in 1992 has not been considered in an advisory opinion subsequent to the 1996 promulgation of Commission regulations that remain in effect and explicitly allow candidates to deliver campaign issue speeches at university events. 11 CFR 114.4(c)(7). Such an opinion would have had to address the application of the FECA and Commission regulations to payment of a speaker's fee to the candidate for an appearance that was otherwise permissible under those regulations. Thus, assuming *arguendo* that a university's payment of a speaker's fee to a candidate, who makes a permissible appearance pursuant to the regulations, poses a valid legal issue under the FECA and Commission regulations, it is one of first impression with broad FECA policy implications, including possible constitutional ramifications. Accordingly, the Commission should be wary of deciding such a question for the first time in the enforcement process. This complaint is also highly inappropriate for consideration of the issue (if it is an issue), since the university's payment to General Clark's agent was refunded before the campaign's receipt or notice of the complaint, and also since General Clark's travel expenses related to the speech were never even billed to or paid by the university in the first instance. (Complainants are understandably mistaken about the travel expense payment since the contract with GTN does indicate that the university agreed to pay these expenses.)

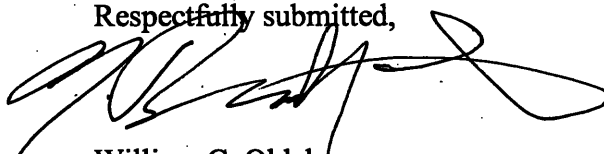
c) The 1996 regulations do not codify the 1992 advisory opinion to David Duke in any respect. The regulatory history (its Explanation and Justification) cites the opinion,

with approval, as allowing a candidate to make speaking appearances at colleges and universities in his capacity as a prominent speaker on particular issues, rather than as a candidate speaking about his election campaign. 60 *Fed. Reg.* 64270, December 14, 1995. More importantly, this history indicates that the currently applicable Commission regulations permit candidate campaign appearances at universities which are open to students, the entire university community and the public, subject to the "reasonable efforts" of the university to ensure that the candidate's appearance is conducted in an academic setting and not turned into a campaign rally by the candidate or the host university. Even so, the Commission indicated that such "reasonable efforts" do not require the university "to monitor [campaign] buttons or campaign materials brought in or worn by members of the audience." *Id.* at 64271.

d) In general, advisory opinions of the Commission are "shields" from potential enforcement action and not "swords" that threaten or impose enforceable duties or liabilities on candidates, campaign committees, and other persons within the FEC-regulated community. See 2 U.S.C. §437f, 11 CFR Part 112. They apply the extant provisions of FECA and Commission regulations to the specific facts presented in the advisory opinion request and give protection from future FEC enforcement action if the requesting person acts in reliance on, and in accord with, the opinion. 2 U.S.C. §§437f(a), 437f(c). They do not prescribe general rules of law that mandate compliance by all persons in all similar circumstances. 2 U.S.C. §437f(b). Furthermore, given the statutorily mandated changes in the identity of the six (6) members of the Commission, who must approve every issued advisory opinion by at least four affirmative votes, a past advisory opinion is not the immutable expression of FEC interpretation for all time. In other words, FEC policy expressed or reflected in an advisory opinion issued in the 1992 presidential election cycle does not compel or even authorize FEC enforcement action with respect to candidate actions in the 2004 presidential election cycle.

For the reasons discussed above, Clark for President, Inc., and its counsel urge the Commission to find no reason to believe any violations of the FECA or Commission regulations may have occurred in MUR 5392, and close the file. Or in the alternative, counsel urges the Commission to make no findings in MUR 5392 and close the file without further action under 2 U.S.C. §437g.

Respectfully submitted,



William C. Oldaker
N. Bradley Litchfield
William J. Farah
Oldaker, Biden & Belair, LLP
Counsel to Clark for President, Inc.

Enclosures (Copy of October 24, 2003 letter and refund check from GTN to university)



GREATER TALENT

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New York, NY 10016
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October 24, 2003

Dean N. William Hines
University of Iowa, College of Law
280 Boyd Law Building
Iowa City, IA 52242-1111

Re: Gen. Wesley K. Clark (USA-Ret)

Dear Dean Hines:

As you know, shortly before General Clark's appearance at the University of Iowa's College of Law on September 19th, he announced his entry into the contest for the Democratic Party's nomination in the 2004 presidential election.


Shortly after his speech at the University of Iowa, he announced that he would no longer (for the duration of his candidacy) accept nor give paid speaking appearances and would return his fees for speeches given after he announced his candidacy.

Accordingly, as directed by General Clark, we are enclosing our check (# 158230) in the amount of \$24,000.00 for his portion of the fee paid by the University of Iowa College of Law for his speech at your university.

He has also requested that we inform you that you will not be billed for any portion of his travel to the event.

If you have any questions about this matter, feel free to call me directly. GTN appreciates the opportunity to bring significant informed personalities to your campus and looks forward to serving you again in the near future.

Sincerely,



Thomas L. Marcoston
Executive Vice President

Enclosure
GTN 14055

437 FIFTH AVENUE
NEW YORK, N.Y. 10016

PAY ***** Twenty Four Thousand
***** Dollars and No Cents

UNIV OF IOWA, COLLEGE OF LAW
ATT: N WILLIAM HINES, DEAN
260 BOYD LAW BLDG
IOWA CITY, IA 52242-1111

JPMORGAN CHASE BANK
NEW YORK, NY 10018
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